Re Natarajan a/l Kuppusamy, ex p Co-operative Central Bank Ltd (in receivership)

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D3-29-4693-90
VC GEORGE J
15 APRIL 1992

Bankruptcy *— Notice — Application to set aside notice — Application filed before expiry of statutory seven-day period in notice — Time for compliance with notice deemed to be extended until application heard and determined — Bankruptcy Rules 1969 r 95*

Bankruptcy *— Receiving and adjudication orders — Application to annul and rescind orders — Orders made on presentation of petition — Petition filed before disposal of earlier application of debtor to set aside bankruptcy notice — Whether act of bankruptcy committed — Whether petition validly presented — Bankruptcy Act 1967 s 5(1) — Bankruptcy Rules 1969 r 95*

The applicant applied to the court for an order to annul the adjudication of the applicant as a bankrupt. A bankruptcy notice had been taken out against the applicant and was served on him. He was given seven days excluding the day of service to pay the sum demanded. Before the seven-day period had expired, pursuant to r 95(1) of the Bankruptcy Rules 1969 ('the rules'), he filed an affidavit in court by which he sought to have the bankruptcy notice set aside. The registrar of the court had failed initially to fix a date for the hearing of the application and eventually the petitioner presented a bankruptcy petition against the applicant alleging that he had failed to comply with the requirements of the bankruptcy notice. The petition was served on the applicant and eventually the petition and the application to set aside the bankruptcy notice were fixed for hearing on the same day. The applicant failed to appear and his application was struck off. The petition was treated as unopposed and receiving and adjudication orders were then made.

It was contended for the applicant that because of the existence of the application for setting aside the bankruptcy notice, r 95(2) had the effect that the applicant could not be said to have committed an act of bankruptcy vis-a-vis the bankruptcy notice. It was contended for the petitioner that, as the registrar had not extended the seven-day period in the bankruptcy notice, the applicant had committed an act of bankruptcy upon the expiration of the period. It was the practice in the courts that registrars generally did not expressly extend the time specified for compliance with a bankruptcy notice pending the hearing and determination of an application for setting aside the bankruptcy notice.

Held, allowing the application in part:

(1) In the face of the language used in r 95(2) of the rules and the prevailing practice, where the r 95(1) affidavit is filed before the

A expiry of the statutory seven-day period given by the bankruptcy notice, the time for compliance with the notice is to be deemed to have been extended until the application has been heard and determined.

(2) As no act of bankruptcy was deemed to have been committed until the disposal of the application, the filing of a petition before the disposal of the application purportedly grounded on non-compliance with the bankruptcy notice was invalid.

B

[Bahasa Malaysia summary

C Pemohon telah memohon kepada mahkamah suatu perintah untuk membatalkan penghukumannya sebagai seorang bankrap. Suatu notis kebankrapan telah dikeluarkan terhadap pemohon dan telah disampaikan kepadanya. Dia telah diberi tujuh hari tidak termasuk hari penyampaian untuk membayar jumlah wang yang dituntut. Sebelum masa tujuh hari itu telah tamat tempohnya, mengikut k 95(1) Kaedah-
D Kaedah Kebankrapan 1969 ('kaedah itu'), dia telah memfailkan suatu afidavit di mahkamah dengan mana dia meminta untuk notis kebankrapan itu diketepikan. Pendaftar mahkamah telah gagal pada mulanya untuk menetapkan tarikh untuk pembicaraan permohonan itu dan akhirnya pempetisyen telah mengemukakan suatu petisyen
E kebankrapan terhadap pemohon mengatakan bahawa dia telah gagal mematuhi kehendak notis kebankrapan itu. Petisyen itu telah disampaikan kepada pemohon dan kesudahannya petisyen itu dan permohonan untuk mengetepikan notis kebankrapan itu telah ditetapkan untuk dibicarakan pada hari yang sama. Pemohon tidak hadir dan permohonannya itu telah dibuang. Petisyen itu telah
F diperlakukan seperti ia tidak dibantah dan perintah penerimaan dan penghukuman telah kemudian dibuat.

Telah dihujahkan bagi pihak pemohon bahawa kerana kewujudan permohonan untuk mengetepikan notis kebankrapan itu, k 95(2) mempunyai kesan bahawa pemohon tidak boleh dikatakan telah
G melakukan suatu perbuatan kebankrapan bertentangan dengan notis kebankrapan itu. Telah dihujahkan bagi pihak pempetisyen bahawa kerana pendaftar tidak melanjutkan masa tujuh hari dalam notis kebankrapan itu, pemohon telah melakukan suatu perbuatan kebankrapan apabila tamat tempoh masa itu. Adalah amalan di mah-
H kamah bahawa pendaftar pada amnya tidak dengan nyata melanjutkan masa yang ditetapkan untuk pematuhan dengan notis kebankrapan sementara menanti pembicaraan dan pemutusan suatu permohonan untuk mengetepikan notis kebankrapan.

Diputuskan, membenarkan sebahagian permohonan itu:

I (1) Ketika menghadapi bahasa yang digunakan dalam k 95(2) kaedah itu dan amalan yang lazim, di mana afidavit k 95(1) telah difailkan sebelum masa statutori tujuh hari yang diberikan oleh notis kebankrapan itu tamat tempohnya, masa untuk pematuhan dengan

notis itu boleh dianggap telah dilanjutkan sehingga permohonan itu telah didengar dan diputuskan.

(2) Kerana tiada perbuatan kebankrapan telah dianggap berlaku sehingga penyelesaian permohonan itu, pemfailan suatu petisyen sebelum penyelesaian permohonan itu dikatakan atas alasan ketidakpatuhan dengan notis kebankrapan itu tidak sah.]

Cases referred to

1 *Re Krishnamurthy Nagaratnam, ex p Mayban Finance Bhd* [1990] 2 MLJ 183 (not folld)
2 *Soh Bok Yew v Cindee Developments Sdn Bhd* [1977] 1 MLJ 242 (folld)
3 *Re A Debtor (No 10 of 1953)* [1953] 1 WLR 1050; [1953] 2 All ER 561 (folld)

Legislation referred to

Bankruptcy Act 1967 s 5(1)
Bankruptcy Rules 1969 r 95

R Vasanthi (Ponmugam & Co) for the judgment debtor.
S Gunawathi (Nazri Aziz & Wong) for the judgment creditor/petitioner.

Cur Adv Vult

VC George J: By this motion the court's power given by s 105(1) of the Bankruptcy Act 1967 to annul the adjudication of the applicant a bankrupt is invoked by the bankrupt, Natarajan a/l Kuppusamy.

The bankruptcy notice was issued on 7 June 1990 and served on the applicant on 9 August 1990. He was given seven days excluding the day of service to pay up the $547,355.77 demanded. On 15 August 1990, ie before the expiry of the seven days, Natarajan filed an affidavit encl 4 in the court file by which he sought to have the bankruptcy notice set aside. By r 95 of the Bankruptcy Rules 1969, the filing of such an affidavit operates as an application to set aside the bankruptcy notice, and the registrar is required by the rule to fix a day for the hearing of the application which she appears to have, initially at least, overlooked doing.

On 19 January 1991, the petitioner purported to present its bankruptcy petition against Natarajan relying therein on the allegation that Natarajan had committed an act of bankruptcy in that he had failed to comply with the requirements of the said bankruptcy notice of 7 June 1990.

This petition which was fixed for hearing for 17 July 1991 was served on the respondent on 2 April 1991. It was only after the date for the disposal of the petition had been given did the registrar, on being reminded of the omission to fix a date for the hearing of the application to set aside the bankruptcy notice, fix the hearing of that application also for 17 July 1991.

When the application encl 4 to set aside the bankruptcy notice was called for disposal on 17 July 1991, neither Natarajan nor his counsel were present. It was accordingly struck off. Thereupon the petition was called for

A disposal and in the absence of Natarajan and his counsel it was treated as an unopposed petition. Receiving and adjudication orders were made.

Cik R Vasanthi, counsel for the applicant in this motion now before me, in effect submitted that the court ought not to have adjudged her client bankrupt in that in her submission because of the existence of the application to set aside the bankruptcy notice, r 95(2) had the effect that it could B not be said that an act of bankruptcy had been committed vis-a-vis the bankruptcy notice of 7 June 1990.

The rule is as follows:

> 95(1) The filing of an affidavit shall operate as an application to set aside the C bankruptcy notice, and thereupon the Registrar shall fix a day for hearing the application, and shall give not less than three clear days' notice thereof to the debtor, the creditor and their respective solicitors, if known.
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> (2) If the application cannot be heard before the time specified in the notice for compliance with its requirements, the Registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined. D

Cik S Gunawathi for the petitioner pointed out that although the registrar did eventually fix a date for the hearing of the application to set aside the bankruptcy notice, she had not extended the time specified in the notice and accordingly in her submission, as soon as the seven days had expired, E the debtor not having paid up as required by the notice had committed the act of bankruptcy on which the petition was founded. She referred to *Re Krishnamurthy Nagaratnam, ex p Mayban Finance Bhd*[1] in which case the learned judge pointed out that although the application to set aside the bankruptcy notice had been filed before the expiry of the statutory seven days, there was no evidence that the applicant had applied for an extension F of the seven-day period and there was no evidence that the registrar had given any such extension. The learned judge further went on to point out what in effect was that the application to set aside the bankruptcy notice did not appear to have been pursued by the applicant which attitude of the applicant, it seems to me, influenced the learned judge into holding as he G did that it was too late for the applicant to complain that his application had not been heard.

Unlike the learned judge in *Re Krishnamurthy Nagaratnam*,[1] I had the benefit of having my attention drawn (by Tengku Muzani representing the Official Assignee) to the judgment of the Federal Court in *Soh Bok Yew v Cindee Developments Sdn Bhd*[2] where the Federal Court in its judgment H referred to a judgment of Harman J in *Re A Debtor (No 10 of 1953)*[3] where at p 1054 the learned judge pointed out that the rule (equivalent to our r 95(2)) is directory and compels the registrar to extend it (ie the time given to the respondent to pay up what is demanded in the bankruptcy notice) until the application has been heard and determined. The Federal Court I with reference to the case before it said that there had been several adjournments of the application by the judge but that did not make any difference 'because the registrar has no choice and may be deemed to have made corresponding extensions of time for compliance with the notice'.

I have made my own enquiries in respect of the current practice in our courts and understand the position to be that the registrars generally do not expressly extend the time that they are required to do by r 95(2).

Accordingly I hold that in the face of the language used in r 95(2) and the prevailing practice, where the r 95(1) affidavit is filed before the expiry of the statutory seven days given by the bankruptcy notice, the time for compliance with the notice is to be deemed to have been extended until the application has been heard and determined.

Section 5(1) of the Bankruptcy Act 1967 provides that a creditor shall not be entitled to present a bankruptcy petition against a debtor unless, among other things and as provided by s 5(1)(c), an act of bankruptcy on which the petition is grounded has been committed within six months before the presentation of the petition. It follows that where before the period for compliance with a bankruptcy notice has expired the alleged debtor files a r 95(1) affidavit-application, as no act of bankruptcy is deemed to be committed until the disposal of the application, the filing of a petition before the disposal of the application purportedly grounded on non-compliance with the bankruptcy notice is invalid. The petitioner has to wait until the disposal of the application before filing the petition.

Accordingly the receiving and adjudication orders made on 17 July 1991 ought not to have been made having been made on a petition that the petitioner was not entitled to have presented.

It follows that prayer (1) of the motion encl 14 is well founded. The orders made on 17 July 1991 are respectively annulled and rescinded. The costs of this motion will be paid by the petitioner. Since Natarajan did not oppose the petition when it was called, in respect thereof each party will bear its own costs. As to prayer (3) of the motion by which the applicant seeks damages, it is refused.

Application allowed in part.

Reported by PS Ranjan